B & C Contracting Co. *and* Northwest Ohio District Council of Carpenters a/w the United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Cases 8–CA–29634 and 8–CA–29914

June 6, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On June 4, 1999, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions, with a supporting brief, and an answering brief[1] in opposition to the General Counsel's exceptions. By notice dated June 21, 2000, the Board invited the parties to file supplemental briefs addressing the framework for analysis for refusal-to- consider and refusal-to-hire violations set forth in the Board's May 11, 2000 decision in *FES,* 331 NLRB 9. On July 11 and 12, 2000, respectively, the Respondent and the General Counsel filed their supplemental briefs.[2]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions as further discussed below, and to adopt the recommended Order.

1. The judge found that the Respondent did not violate Section 8(a)(3) and (1) of the Act by failing to accept applications from, and consider for employment, the January 7 and 8 groups of union applicants. We agree with the judge's finding for the reasons set forth by him and for the additional reasons set forth below.

In *FES*, supra at 15, the Board recently clarified the elements of a discriminatory refusal-to-consider violation:

> To establish a discriminatory refusal to consider, pursuant to *Wright Line* . . . the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.
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> . . . .
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> If the respondent fails to meet its burden, then a violation of Section 8(a)(3) is established.

The judge's findings comport with this test. According to the credited testimony, on January 7, approximately 11 union members visited the Respondent's onsite trailer at its Leipsic, Ohio project, and sought to apply for work. The Respondent was aware of these individuals' union affiliation. The union members met with Whitson, who served as the Respondent's crew leader and jobsite supervisor, and was responsible for, among other things, hiring and firing employees at the Leipsic project. Whitson provided applications to all the union members who sought to apply for work on that date. Before receiving the completed applications, Whitson asked if any of the individuals were willing to travel. None were willing. After examining the first two completed applications and concluding that the applicants were carpenters, Whitson stated to the group that he needed millwrights, not carpenters.

On January 8, approximately seven union members arrived at the Respondent's onsite trailer to apply for work. The Respondent was aware of these individuals' union affiliation. Whitson provided all of these individuals with applications. He also asked them if they were willing to travel. None were willing. After the applicants informed Whitson that they were members of the Carpenters' Union, Whitson told them that he needed millwrights, not carpenters.

We agree with the judge that the Respondent did not, as alleged in the complaint, fail to accept applications from and fail to consider for hire the 17 named individuals who applied for work on January 7 and 8 because of their union affiliation. Specifically, as the judge found, all of the individuals were provided with, and completed, applications. Furthermore, Whitson asked the applicants questions relating to the two paramount qualifications

[1] The Respondent's answering brief, including its posthearing brief, which is attached to the answering brief as an appendix, is 105 pages. Although Sec. 102.46 (j) of the Board's Rules and Regulations states, inter alia, that "[a]ny brief filed pursuant to [Sec. 102.46] shall not . . . exceed 50 pages in length," the Board inadvertently accepted the Respondent's nonconforming answering brief. We have, therefore, considered the Respondent's answering brief in its totality.

[2] In light of our discussion below, we deny the General Counsel's request, in his supplemental brief, to remand this case for further consideration in light of *FES*, supra.

[3] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent did not violate Sec. 8(a)(3) and (1) of the Act by failing to accept and consider the February 2 and 3 faxed applications, we find it unnecessary to rely on his statements, in fn. 76, regarding these applicants' purported lack of bona fides.

required for employment with the Respondent—whether the applicants were millwrights who were willing to travel (willingness to travel was necessary at that time). Thus, the Respondent did not exclude these individuals from its hiring process. To the contrary and consistent with the judge's finding, Whitson considered the applicants in question.[4]

2. We adopt the judge's finding that the Respondent did not violate Section 8(a)(3) and (1) of the Act by failing to accept applications from and consider for employment the group of applicants whose resumes the Union sent to the Respondent at its Leipsic, Ohio worksite via facsimile (fax) transmission on February 2 and 3, 1998.

The judge's findings regarding these applicants comport with the *FES* test for refusal-to-consider violations described above. Specifically, the judge credited Whitson's testimony that he never physically received the faxed resumes. Thus, the Respondent did not exclude these applicants from its hiring process.

In excepting to the judge's finding, the General Counsel argues that the judge erroneously found that the General Counsel had failed to prove that the Respondent's officials ever actually received the faxed resumes. The General Counsel contends that knowledge of a fax transmission received by an employer's fax machine during regular business hours should be imputed to the employer, regardless of whether the person to whom the fax was addressed actually received the fax.

Although we recognize the facsimile machine as an effective and generally reliable means of communication, we decline to adopt the rigid rule advocated by the General Counsel. Contrary to the General Counsel, we do not believe that such a rule was established by the Board's decision in *Clow Water Systems Co.*, 317 NLRB 126 (1995), enf. denied 92 F.3d 441 (6th Cir. 1996), which involved a striking union's facsimile transmission of an unconditional offer to return to work.

There, the employer had accepted the use of its fax machine as an appropriate means of communication. In that context, the Board rejected a requirement that the employer's actual knowledge of the transmission be shown. Rather, the Board concluded that the employer bore the "responsibility for maintaining adequate office procedures concerning fax transmissions, and knowledge of the receipt of the Union's fax communications during regular office hours may reasonably be imputed to it." Id. at 127.

Here, the judge found that the faxed applications had been received by the Respondent's fax machine. But he credited the testimony of Whitson, the Respondent's crew chief leader and jobsite supervisor at the Leipsic site, that he himself did not receive the faxed applications (which were addressed to the Respondent's "superintendent") and that he had no knowledge of them. The judge also found that the "Union chose to send the resumes to the Company fully aware that the Company was pulling up stakes at the Leipsic job, had laid off employees, and was demobilizing," but made no effort to verify receipt.

In this case, it was Whitson's knowledge that was material. The demonstrated receipt of the faxed applications by the Respondent's machine certainly created a presumption that Whitson himself had seen them. But the Respondent rebutted that presumption by Whitson's credited testimony, which in light of the Respondent's on-going move was not inherently implausible. The facts here, then, distinguish this case from *Clow*. The Respondent cannot fairly be faulted for maintaining inadequate office procedures. Nor is it unfair to impose the risk of an uncompleted communication on the Union, which sent the resumes knowing that the Respondent's office might well be in disarray. In these unusual circumstances, we agree with the judge that knowledge of the faxed resumes cannot be imputed to the Respondent.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, B & C Contracting Co., Kissimmee, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Mark F. Neubecker, Esq., for the General Counsel.

[4] The judge stated that the issue of the Respondent's antiunion animus with respect to the January 7 and 8 groups of applicants was moot because the General Counsel did not establish, as a threshold matter, that the Respondent failed to accept applications from or failed to consider these individuals for hire. Assuming arguendo that the General Counsel met his burden under *FES* for establishing the elements of a refusal-to-consider violation, we would still find that the Respondent met its burden of demonstrating "that it would not have considered the applicants even in the absence of their union activity or affiliation" because the applicants did not possess the two chief qualifications (as discussed above) required for employment with the Respondent.

[5] This result is not inconsistent with the Board's decision in *Electrical Workers Local 98 (Telephone Man)*, 327 NLRB 593 (1999), also cited by the General Counsel. At issue there was the union-respondent's notice of a fax, which had been received during normal business hours. The Board adopted without comment the judge's finding that the union did have notice. The judge drew an adverse inference from the failure of the union to call the individual addressee as a witness. She also pointed out, citing *Clow*, that the "Board has recognized that fax transmission is an effective means of communication." 327 NLRB at 601. Here, in contrast, the recipient denying notice did call a witness, whose testimony was credited. The circumstances, meanwhile, strongly suggested to the sender that fax transmission was *not* "an effective means of communication."

Alan G. Ross, Esq. and *Fred Seleman, Esq. (Ross, Brittain & Schonberg Co., LPA),* of Cleveland, Ohio, for the Respondent.

Michael T. Rahn, of Northwest Ohio District Council of Carpenters, Toledo, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. This case was tried before me in Toledo, Ohio, on November 2, 3, and 4, 1998, pursuant to unfair labor practice charges filed with the National Labor Relations Board (the Board) by the Northwest Ohio District Council of Carpenters a/w the United Brotherhood of Carpenters and Joiners of America, AFL–CIO (the Union) on February 4, 1998, in Case 8–CA–29634 (and as amended on June 18 and July 31, 1998), and on May 14, 1998, in Case 8–CA–29914, against B & C Contracting Co. (the Respondent). On July 31, 1998, the Regional Director for Region 8 issued an order consolidating these cases and a consolidated complaint against the Respondent.

The consolidated complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by cautioning an employee not to discuss his wages or per diem with other employees and threatening not to hire any "union guys" and "guys from the [Carpenters] union." The consolidated complaint also alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to *accept* job applications from and *consider* for employment certain named persons because of their involvement with, and support of the Union, and engaging in concerted activities.[1] The Respondent filed a timely answer to the consolidated complaint generally denying any violation of the National Labor Relations Act (the Act) and asserting various affirmative defenses. The decision here reflects my consideration only of the charges remaining after consolidation of the respective cases.

The General Counsel and counsel for the Respondent timely filed briefs in support of their respective positions;[2] the representative for the Charging Party did not file a brief.

On the entire record in this case, including posthearing briefs filed by the parties, and on my observation of the demeanor of the witnesses, I make the following

[1] On November 2, 1998, at the hearing, the General Counsel orally moved to amend the consolidated complaint to include a new par. 9, which charged that the Respondent's alleged conduct in parts 6(A), (B), and (C) of the complaint violated Sec. 8(a)(1) of the Act; this charging language had been inadvertently omitted from the consolidated complaint. This inclusion of new par. 9 required the renumbering of the remaining parts of the complaint. (See GC Exh. 2.) The Respondent's counsel was notified of the proposed amendment in a telephonic conference in which the Respondent's counsel, the General Counsel, and I participated on October 27, 1998. There was no opposition to the proposed amendment, which I approved on the record.

[2] On December 14, 1998, the parties, pursuant to a request councel for the General Counsel, were granted an extension of time for filing briefs from December 15, 1998, to January 8, 1999.

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Florida corporation, with its principal office and place of business in Kissimmee, Florida, engages in the business of a millwright subcontractor on construction projects throughout the United States. During the period May 14, 1997, through May 14, 1998, in conducting its business operations, the Respondent provided services valued in excess of $50,000 for corporations which themselves were in commerce on other than an indirect basis. The Respondent admits, and I find, that at all material times through May 14, 1998, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that at all material times, the Union, Northwest Ohio District Council of Carpenters a/w the United Brotherhood of Carpenters and Joiners of America, AFL–CIO has been a labor organization within the meaning of Section 2(5) of the Act.[3]

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts[4]

The Respondent's business in the main entails the construction of feed and flow mills and grain, human, and pet food processing plants, specifically the assembly and installation of machinery, and fabrication of supporting structures used in these facilities. The Respondent performs these services as a subcontractor employed or retained by general contractors located around the United States who are charged with overall construction of mills and processing plants. The Respondent, thus, in simplest terms, is an itinerant provider of millwright workers and services.

Millwright work requires training, experience, and competence in mechanical work and applications. Millwrights, at a minimum, should be able to competently fabricate and weld metal structures and be familiar with the installation of certain types of equipment associated with mills and processing plants, such as conveyors, extruders, hoppers, coolers, motors, and drivers. Millwrights are often expected to be able to operate certain types of equipment such as forklifts and cranes, which are utilized to move equipment and erect tall structures.

The Respondent's main office and facility is located in Kissimmee, Florida, and its principal owner and president is Doug-

[3] The Northwest Ohio District Council includes a number of local unions under its aegis, including but not limited to Carpenters Local 1138, Millwrights Local 1393, Carpenters Local 248, Carpenters and Millwrights Local 372, Carpenters and Millwrights Local 2239, and Residential Carpenters Local 1365.

[4] The findings in this section reflect my consideration of the total body of evidence presented at the hearing, including the reasonable inferences gleaned from this evidence. To the extent these findings conflict with or are contrary to other evidence of record, I have specifically discredited any such conflicting or contrary evidence. Where witness testimony is involved in these findings, I have credited the pertinent testimony consistent herewith.

las Coberley.[5] The Respondent, however, contracts to perform millwright services throughout the United States and, consequently, establishes a business presence at the various jobsites around the country and occasionally will solicit applications for employment from these construction sites.[6] The Respondent employs certain permanent or core employees—core hands—who are organized into work crews that travel from job to job. At any given time, the Respondent may have several crews out and about the country providing millwright services. Core hands always travel job to job. When it needs additional help, the Respondent first attempts to hire workers near the construction site in question to reduce operating costs.[7] If local hires are not forthcoming, the Respondent will place help-wanted ads in newspapers in localities closest to the jobsite in question. These ads are generally placed by the Respondent's staff in Florida. On occasions, when advertised positions have been filled or otherwise are unavailable, the Respondent may offer employment at its prospective or ongoing projects in other locations to qualified applicants who respond to the ads. In such cases, applicants are required to travel to these sites.

Beginning around July 14, 1997, and ending around February 1998, the Respondent performed millwright work under contract for a general contractor, Todd & Sargent (T & S), for the erection of a pet food processing plant in Leipsic, Ohio.[8]

T & S was responsible for the full scope of construction on the project (the IAMS Pet Food project) and hired all subcontractors, including the millwright companies. In addition to the Respondent, there were three other millwright companies working at the Leipsic site—Spallinger, PMI, and Grub.[9] T & S itself performed the bulk of the millwright work and assigned the balance to the Respondent and the other millwright companies. Pursuant to its contract with IAMS Pet Food, T & S planned to have all machinery and equipment installed in the plant by March 1998.[10]

Around January 30, 1998, the Respondent was finishing up its assignments and had begun laying off workers at the IAMS project. T & S determined that B & C had completed its assignments around this time and released them from the contract.[11]

The Respondent's crew leader and jobsite supervisor at the Leipsic project was David "Dave" Whitson. Whitson began working for the Respondent in January 1997 as a nonunion-affiliated millwright. Whitson assumed supervisory status for the Respondent sometime in 1997 and traveled around the United States as a crew leader performing millwright work for the Respondent. Whitson's duties at Leipsic included hiring and firing project employees, keeping and maintaining time reports, supervising clerical workers, arranging for housing, leasing trailers, and other administrative matters.[12] When the Respondent arrived at the Leipsic site, it had a crew of core workers, and ran newspaper ads soliciting additional help from the local labor force.[13] The Respondent began working at Leipsic in July 1997 and left the project permanently on about February 8, 1998.

The Union determined that the Respondent was hiring workers for the Leipsic job in September 1977 through newspaper ads appearing in local newspapers and decided to organize the Respondent's employees through overt and covert means. Towards that end, the Union undertook to "salt" the Respondent's labor force with undercover union members whose wages would be subsidized by the Union if hired, and who would report to the Union about work conditions, the number of workers, workers' attitude, and other matters of importance to the Union's organizing effort.[14] Two members of Millwright Local 1393, namely Curtis Johnson and Duane Greear, intentionally not disclosing their union affiliation, applied for work at the Respondent's Leipsic project and were hired in September and November 1997, respectively, by the Respondent.[15]

[5] In addition to running the Company on a day-to-day basis, Douglas Coberley is responsible for hiring and firing; Coberley also works as a millwright on occasion. The Respondent admits, and I find, that Coberley is a supervisor and/or agent within the meaning of Sec. 2(11) and (13), respectively, of the Act.

[6] The Respondent sets up its operations in onsite rented trailers. These trailers serve as offices and employee breakrooms. The office trailers are outfitted with telephones and a fax machine.

[7] The Respondent provides a hotel or housing allowance, an hourly per diem, and other travel related expenses to workers who have to travel to the jobsite. By contrast, local hires are not provided these perquisites and, thus, are preferred by the Respondent.

[8] Todd & Sargent broke ground on this project around the end of March 1977.

[9] Spallinger began working at the project in September 1997; Grub began working the site at the end of December 1997. PMI also was preparing some specialty millwright work in December 1997. T & S's policy, to the extent practicable, was to hire local companies. Spallinger and Grub were local millwright firms to whom T & S assigned various aspects of the millwright work at the Leipsic project.

[10] The installation of all equipment and machinery, though planned to be completed by March 1998, was not completed until April 1998.

[11] The Respondent, at the time it left the IAMS project, had some uncompleted work, that is, certain platforms, the design for which had to be revised. Consequently, T & S released the Respondent before these platforms were completed during the first week of February 1998 because the revisions to the platforms delayed their completion for about a month. T & S paid the Respondent based on hours worked and materials used, irrespective of whether there was available work for it; extensive delays, therefore, were costly to T & S.

[12] The Respondent admits, and I find, that Whitson was a supervisor and/or agent within the meaning of Sec. 2(11) and (13) of the Act.

[13] Whitson's core crew consisted of six employees. Notably, the Respondent employed as many as 18 employees at the site for about 4 months, then went to 13 employees, and ultimately had 6 employees around 2 weeks before the end of the project. The Respondent did not hire any additional or new employees for the Leipsic job in 1998. Two employees—Jack Turpin and Kevin Conrad—were hired in 1997 (August and November, respectively), but left the job for the Christmas holidays. They returned to the job during the week of January 5–11. (See R. Exh. 9.)

[14] This is a salting case. Salting has been defined as the act of a trade union in sending a union member or members to an unorganized jobsite to obtain employment and then organizing the employees. A "salted" member or "salt" is a union member who obtains employment with an unorganized employer at the behest of his or her union so as to advance the union's interests there. *Tualatin Electric*, 312 NLRB 129, 130 fn. 3 (1993), enfd. *Tualatin Electric v. NLRB*, 84 F.3d 1202, 1203 fn. 1 (1996). Salting is not illegal under the Act.

[15] Johnson's application (only the questionnaire) is contained in GC Exh. 14 and dated September 15, 1997; and Greear's application and

The Respondent did not become aware of Johnson's and/or Greear's union membership and their engaging in organizing activities on behalf of the Union until around January 16, 1998, when the Union notified it by letter.[16] Between the time Johnson and Greear were hired and the Union's notification to the Respondent of their organizing activities per the January letter, the union salts engaged in no organizing activities that came to Respondent's attention or was otherwise discernible by it.[17] However, on January 7, 11 union members and, on January 8, another 5 members presented themselves at the Respondent's Leipsic site and sought to make application for work.[18] The union status or affiliation of these was observable by virtue of union emblems on their clothing and other paraphernalia. On both dates, the Respondent allowed the unionists to make application on forms provided by it. Moreover, eight of the applicants also submitted forms with their applications indicating they were union organizers.[19] However, none of these applicants were hired by the Respondent. Notably, none of them ever followed up on their applications.

On or about January 25, 1998, the Respondent placed an ad in a Tulsa, Oklahoma newspaper seeking workers.[20] The ad sought millwrights, welders, and fitters who would be required to travel. Applicants were directed to call the Respondent's telephone and telefax numbers at Leipsic.[21] However, the ad was placed by the Respondent for job openings at sites other than the Leipsic project, which at the time was set to be shut down or demobilized by the Respondent.[22]

On January 26, two officials of the Union—Michael Rahn, special projects representative, and Terry Bishop, director of organizing—visited the Leipsic site and arranged to speak to Whitson about problems on the job, the Respondent's possible need for additional workers, and the Union's willingness to furnish workers.[23] Whitson advised that the Respondent did not need any additional workers at the Leipsic site.[24]

On or about January 23, Union Representative Ray Lorton wrote[25] to the Respondent (Coberley) and advised that a majority of the employees at the Leipsic project had designated the Union as its bargaining representative and demanded recognition and bargaining rights on their behalf; the Respondent was advised that Greear had been designated organizing captain by the Union. On or about January 26, Coberley responded by letter to Lorton's letter stating that the Respondent expressed its doubt about the Union's majority status and invited the Union to pursue the matter before the Board.

Sometime after this meeting, the Union received a copy of the Respondent's January 25 ad soliciting workers from one of the business agents in the Tulsa area. Thinking that the Respondent was trying to circumvent their hiring and organizational efforts at Leipsic, the union officials assembled 14 re-

questionnaire, GC Exh. 12 and 12(a), respectively, are dated November 14, 1997. Johnson was interviewed and hired by Whitson. Greear received his application and questionnaire from one of the Respondent's employees, Buril Hardin, who passed the forms on to Whitson who hired him after a telephone interview.

[16] The Union sent a letter advising the Respondent—Whitson at the Leipsic site—of the membership/organizer status of Johnson and Greear on or about January 16, 1998. (CP Exh. 1.) The Union also attempted to notify the Respondent—Coberley—at the Respondent's Florida address of the status of Johnson and Greear by certified letter dated January 19, 1998; however, this letter was returned to the Union as unclaimed. (GC Exh. 9.)

[17] Although Johnson and Greear reported to the Union about job-related matters, they evidently maintained a very low organizational profile until the Union sent the Respondent the January 16 notification letter referenced above. Greear testified that between November 19 and the mid-December 1997, he did not actively engage in union organizing and he believed that the Respondent did not know of his union involvement as of January 7 and 8, 1998. Johnson did not testify to any overt union activity on his part prior to the notice letter. But, in mid-January, both Johnson and Greear attended two meetings off the jobsite (on January 15 and 22) to which others of the Respondent's employees were invited and whereat the Union was discussed. Notably, Buril Hardin, an alleged management agent, attended one of these meetings. As a result of these meetings, union authorization cards were signed on January 22 by a majority (7 of 10) of the Respondent's employees still on the job.

[18] The Respondent did not produce the actual applications for alleged applicants Scott Blair and Gail Bowser. Scott Blair, however, credibly testified at the hearing about his applying on January 8 and that Gail Bowser was in his group.

[19] The applications of the January 7 group are contained in GC Exh. 4; the January 8 group's applications are contained in GC Exh. 5. The forms submitted with the application of some of the unionists in both groups containing the following language (on union letterhead):

"I AM A COMET ACTIVIST AND UNION ORGANIZER"

I WANT YOU TO KNOW THAT I WILL WORK HARD AND NOT INTERFERE WITH PRODUCTION IF YOU HIRE ME. HOWEVER, I INTEND TO ORGANIZE YOUR EMPLOYEES INTO NORTHWEST OHIO DISTRICT COUNCIL OF CARPENTERS BY ENGAGING IN LEGAL ORGANIZING ACTIVITIES.

SIGNED:_____

APPLICANT FOR EMPLOYMENT

[20] The ad in question is contained in GC Exh. 3.

[21] The Respondent stipulated and agreed that the telephone and telefax numbers contained in the ad, 419–425–4957 and 419–943–3337, respectively, were the numbers for the Respondent's Leipsic site. Specifically, the Respondent stipulated that 419–943–3337 was the number for its telefax machine located in the onsite trailer at Leipsic; 419–425–4957 was the home telephone number of the Respondent's secretary, Joan Hardin, then living temporarily in Leipsic.

[22] Notably, both Greear and Johnson were laid off along with other employees on January 30. There is no unfair labor practice charge associated with their layoff.

[23] Greear and Johnson accompanied these officials. Whitson asked to record the conversation between himself and the union representatives and evidently did so. However, the recording was not adduced at the hearing.

[24] Bishop originally testified on direct examination that he could not recall Whitson's telling him and Rahn that the Respondent did not need any workers. However, on cross-examination, when confronted with a sworn affidavit he provided to the Union pursuant to this case, which indicated that he averred that Whitson told him that the Respondent did not need workers, Bishop changed his testimony. Bishop also acknowledged that in the affidavit, he averred that this was a sign on the trailer door that read "Company not taking applications at this time." (Tr. 283-287.)

[25] A copy of this letter is contained GC Exh. 10. The letter was sent certified but was returned to the Union as unclaimed. Lorton believed the Union faxed a copy to Coberley in Florida. Inasmuch as Coberley responded to his letter a few days later, this evidently was the case.

sumes of members of Millwright Local 1393 the Union maintained in its files and sent these with a cover letter to the Respondent by telefax on February 2, and again on February 3, 1998;[26] the entire package was faxed to the Respondent's fax number at the Leipsic project. None of these 12 members were hired by the Respondent.

B. The 8(a)(3) Charges

1. The January 7 and 8 union applicants

In essence, the complaint in part 7 alleges that the Respondent, in spite of available job opportunities, unlawfully failed on January 7 and 8, 1998, to accept job application from and consider for employment the following union members:

1. Terry Bishop*	10. Patrick McGuire*
2. Scott Blair**	11. Michael Null*
3. Gail Bowser**	12. Michael Pruss*
4. Daniel Daniels**	13. David Pyles***
5. Bill Glynn**	14. Michael Rahn*
6. Dennis Haack**	15. Bill Reinhart*
7. Fred Haslinger**	16. Timothy Sternberg*
8. Jon Lamb*	17. Kevin Uthoff*
9. John McAfee*	

* Allegedly applied on January 7.

** Allegedly applied on January 8.

***Application dated January 7; allegedly applied January 8.

In support of the charges, the General Counsel called several of the January 7 and 8 applicants and others involved with the events occurring on those days at the Leipsic site.

Terry Bishop, a 20-year member of the residential Carpenters Local and, as noted, the Union's director of organizing at the time of union organizing efforts at the Respondent's Leipsic site, testified at the hearing. Bishop stated that he and 10 other union members, wearing various union garb, personally applied for work at the Respondent's Leipsic project between around 11:45 a.m. and 12 p.m. on January 7. According to Bishop, Whitson was asked if the men could apply for jobs and Whitson supplied them with application forms.[27] Each man filled out an application and returned it to Whitson. Bishop conversed with Whitson about the Leipsic job and asked about hiring opportunities with the Company. According to Bishop, Whitson indicated that he would be hiring probably around the end of January.

Bishop, who included a copy of the organizer notice form with his application, told Whitson of his intention to organize the Respondent and asked Whitson if that posed a problem. According to Bishop, Whitson responded that the Union's organizing efforts were no problem with him, "but probably [would be for] my company." According to Bishop, Whitson also did not mention to him anything about jobs in another state or that employees were required to travel.

Regarding his experience and welding training, Bishop testified that he last worked in the carpenter trade in July 1996 and performed some welding tasks as a carpenter. Bishop admitted that he was not a millwright but claimed to know what millwrights do. He understood that the IAMS Pet Food project entailed simple cutting and welding, which he felt he was qualified to perform. Moreover, it was not his understanding that the IAMS project was in strict terms a millwright job.[28] Bishop stated that he did not know the qualifications of the men who accompanied him to the Respondent's trailer on January 7, or whether they could perform the tasks associated with the IAMS job. Bishop could only say that the men were recruited because they were all out of work at the time and indicated they all had cutting and welding and/or general laborers experience; he did not ask them about their millwright skills. According to Bishop, he applied for a cutting and welding and/or general laborer position with the Respondent and not a carpenter position. If a job were offered, he testified that he would have accepted a job with the Company.[29] According to Bishop to his knowledge, none of the January 7 group was hired (he asked them to contact the Union if a job were offered and none contacted him).

Michael Rahn, as noted, has served as the Union's special projects representative for the past 8 years and was a working union carpenter for approximately 15 years; he also serves on the Union's organizing committee. Rahn testified that the Union received reports from his salts, Johnson and Greear, that the Respondent was or would be in a hiring mode because there was plenty of work remaining on the IAMS project.[30] However, the Union was uncertain as to how many of the Respondent's employees would return to the project after the Christmas holidays. Consequently, Rahn put off making any applications until around the first of the year. At the time (end of year 1997), according to Rahn, the Union had a significant number of its members out of work; therefore he solicited members

[26] See GC 7. The cover letter in question is dated January 30. However, it is undisputed that the entire package was not faxed until February 2 at the earliest.

[27] Whitson did not have enough of the forms, so he made copies using the copy feature of the fax machine in the office.

[28] Bishop testified that millwrights work on conveyors, tear apart pumps, grout (water seal), assemble, and set equipment. He admitted that he was not qualified to assemble equipment, install conveyors, and fabricate transitions (a fabricated structure designed to move material (grain or feed) from one size conduit to another).

[29] Bishop's application (GC Exh. 4) merely indicates in the position-desired part his response of "any."

[30] The Respondent invited its employees to a Company Christmas party around the mid-December 1997 (December 13). According to the unrebutted, and in my view, credible testimony of several of the attending Respondent's employees—Tracy Johnson, Curt Johnson, Duane Greear, and Lester Saxon—Coberley, the Respondent's president, gave a 20-minute speech in which he, among other things, indicated to the assembled employees that the Respondent performed a lot of work for Todd & Sargent and was viewed quite favorably by that company, that the Respondent needed additional personnel and would give a $200-bonus to any employee who could recruit a worker who would stay for at least 90 days. Curt Johnson, Greear, and Saxon specifically testified that Coberley said that there was a lot of work to do yet on the IAMS project. Tracy Johnson testified that Coberley said that the Leipsic job was going to last 1 year, with lots of upcoming work needed. Curt Johnson testified that Coberley was unsure how many workers were not going to return to the job after the holidays and mentioned casually the possible need for 15 to 20 workers.

from the Union's out-of-work list whom he thought or knew had experience working in industrial facilities comparable to the IAMS project. Rahn asked them if they were willing to apply for work at the Respondent's Leipsic project;[31] all agreed to apply. Rahn candidly admitted that he, Bishop, and Michael Null (also a union organizer employee) put in applications because the Company was known to have jobs throughout the United States and particularly did a lot of work for T & S and, if they could get hired, they planned to travel with the Company and work with other union representatives nationwide so as to secure an international agreement with the Union. According to Rahn, he instructed everyone who went to the Respondent's facilities on January 7 if offered a job to accept whatever wages were offered. He provided each applicant with a form indicating that he was seeking work but would also act to organize the Respondent's workers. Rahn essentially corroborated Bishop's testimony regarding the time of arrival of the group which included himself, the wearing of union gear by the applicants, and each one's filling out and submitting an application copied by means of the Respondent's fax machine.[32]

Rahn testified that he last worked with "tools" about 4 years ago. He also admitted that he has not earned a living working with the implements of the carpenter's trade for nearly 8 years. Rahn said his prior work experience, however, included millwright-type tasks; for example, fabricating, drilling, tapping, bolting, and welding structures; refurbishing turbines, pumps, and compressors; building metal support decks; and setting machinery. Rahn understood that this kind of work was similar to work at the IAMS plant. According to Rahn, he would have accepted a job with the Respondent if offered one because he had done the work before. Rahn candidly admitted that he would have only worked for the Respondent as long as it took to organize the Respondent and failing in that effort, he would "walk away."

Scott Blair, 15 years a member of the Carpenters Local 1138, testified that he was told by someone (whose name he could not recall) at the union hall about the availability of jobs at the Leipsic site. Initially, Blair related that the Respondent's hiring was just being talked about at the hall.[33] According to Blair, he and a number of other members were all at the hall on January 8 and just decided to go and apply as all were then out of work. Since he had a large passenger van, he agreed to transport the group that included union members David Pyles,[34] William (Bill) Glynn, Dan Daniels, Don Hursch (or Hersch),[35] and Gail Bowser[36] whom he picked up on the way. According to Blair, the group arrived at the Respondent's facilities around 11–11:30 a.m.; all were wearing union insignia or paraphernalia—union hats and coats with union logos. When they arrived and found the Respondent's trailer, they happened upon a lone secretary (whom Blair did not identify by name), whom he asked for applications. The secretary did not have enough copies of the application and made additional ones through the fax machine. According to Blair, all six, including Bowser, filled out an application and submitted it. Blair said he generally "chit chatted" with the secretary, indicating that they were union members. According to Blair, the secretary said that the Company was just working 40 hours and awaiting arrival of some equipment. The secretary further said that all applications would be sent to the Respondent's main office. The secretary told the group that the Company did have work, but it would entail traveling. After submitting, the applications the group left. Blair gave the secretary a union pen as a memento.

Blair related his work experience which included dry wall (construction) building forms and scaffold, stud work, and concrete framing, "all traditional (typical) carpenter's work," as he described it, which he normally lists on his job applications.[37] According to Blair, regarding millwright work, he has only "helped out a little bit on different jobs;" specifically helping to set pumps and grout (water seal).[38] According to Blair, the Respondent never called him back but if it had, he would have accepted a job if offered.[39]

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[31] According to Rahn, none of the January 7 group were millwrights; all of them were members of various carpenter unions associated with the District Council.

[32] It is noteworthy that Rahn offered no testimony regarding the conversations between Bishop and Whitson on January 7. This is unusual to me in that according to Bishop, the conversation took place in the rather restricted confines of the office trailer in the presence of the entire group. The only statement Rahn attributed to Whitson at the time concerned Whitson's stating that the Respondent was waiting for delayed equipment which caused him problems keeping his workers employed for a full 40 hours.

[33] Rahn testified that he solicited members to make application on January 8 as part of his plan to have applications filed on different days; he merely split the entire group of those he solicited in two. Significantly, Rahn could not recall enlisting Scott Blair and opined that perhaps another member was responsible for his being part of the January 8 group. Blair could not remember whether he found out about the Respondent's hiring at the regular monthly union meeting or the regular Monday morning gathering of out-of-work members who signed the out-of-work list. On cross-examination, Blair conceded that since January 8 was a Thursday, the group must have heard about the hiring on Monday and it took him and them until Thursday.

[34] David Pyles' application is dated January 7, 1998; he did not testify at the hearing.

[35] Hursch or Hersch's name does not appear in the complaint or among the June 8 applications in GC Exh. 5. He also did not appear as a witness at the hearing.

[36] Bowser's application was not produced at the hearing and, of course, does not appear in GC Exh. 5. Bowser did not testify at the hearing.

[37] Blair's application was not produced at the hearing.

[38] Tr. 92.

[39] Blair was somewhat ambiguous in regard to whether he would have accepted employment with the Respondent. He initially testified that traveling presented no problem but then, upon my examination, said he would have taken into consideration where the job was, the prevailing wages, and whether it was going to be worth his time. Blair would not have accepted this job if it did not pay union scale and the offer would have to include a traveler's per diem supplement. Moreover, he would not work for a nonunion signatory company regardless of where it was. (Tr. 96–98.) This is interesting testimony as Rahn testified that all members who elected to participate in the Union's organizing campaign would have received a wage subsidy to make up for differences between the Respondent's wage and union scale. Also, the members of the organizing group were all supposedly told that the Union was seeking to organize the Respondent, which, of course, should have alerted the applicants that the Company was nonunion.

David Whitson, the Respondent's crew leader and chief supervisor at its Leipsic IAMS Pet Food project, testified at the hearing about the events of January 7 and 8.

According to Whitson, on January 7 around 3:45 p.m., he went back to the office trailer to check on his messages and discovered that there were about 10 people there; 2 of the group approached him outside of the trailer and asked for employment applications.[40] Whitson invited the two persons into the trailer and gave each an application. However, the others wanted to come inside, and eventually around 10 persons and he were occupying the 8-by-28-foot trailer. Whitson's secretary was not there at the time, and he had to reproduce the original applications through the fax machine in order to provide each person with an application. Before receiving the filled-out applications, Whitson said he asked the group if any of them were willing to travel. None were willing.[41] While discussing with Rahn the Union's jurisdiction (19 counties in Ohio), Whitson received the first couple of filled-out applications and noticed "carpenters" on them, which had led him to exclaim to the group that he did not need carpenters—he needed millwrights. According to Whitson, he was told (presumably) by Rahn that the Union did represent millwrights—and had some—but they were not present at the time.

Eventually, the applicants left and on the same day, while walking between the mill building and the silos, Whitson came upon two employees, Greear and Tracy Johnson. According to Whitson, Greear initiated a discussion and asked if he were going to hire any of the applicants who had just come in. Whitson said that he told Greear no, that he did not hire them because he did not need carpenters.[42]

Whitson said that he was visited the next day by a second group of men who arrived, according to him, around noon; there were around seven people in this group. Whitson provided these persons with applications and asked them whether anyone was willing to travel. They all said they were not willing. The applicants told him that they were in the Carpenters Union and he again told the group that he did not need carpenters; rather, his need was for millwrights. The men left after submitting these applications.

Whitson could not recall speaking to anyone at the Company about the second group of applicants on January 8. However, on January 9, while in the break trailer, one of the employees asked him if he was going to hire any of these applicants. Whitson's response was to say that he was not going to hire them, as they were carpenters. According to Whitson, there were around six employees in the break trailer when he made this statement.[43]

Whitson testified about certain hiring procedures he employed as the Respondent's crew leader in general and specifically with respect to the Leipsic job. According to Whitson, first, persons who respond to the company's ads or who otherwise seek employment often will tell him they are millwrights because they want the job. They may not actually be qualified, and he has to determine their credentials. Second, if he does not need workers, he will forward them to Coberley or one of the other crew leaders who may need workers. Third, if he needs a worker, he will take the applicant's application and administer a questionnaire-type examination to him to determine how much welding and/or millwright experience he has and the wages he will be paid.[44] At the time of the Union's application on January 7 and 8, the Respondent needed workers for places other than Leipsic and, in fact, according to Whitson, he would have hired all of the applicants if they were millwrights.[45] Thus, according to Whitson, he considered for employment all of the applicants but, having determined they were carpenters and not millwrights, he did not offer to hire them; and, consequently, he did not administer the questionnaire to any of them.[46]

2. The January 30 millwright resumes

Because the Respondent on several prior occasions had not claimed various certified letters sent by the Union to the Respondent at its Florida location, union officials elected to fax 14

[40] Whitson was sure that he met the group around the 3:30 p.m. employee breaktime because while they are on break, he makes rounds checking their work; also, he usually takes his lunch around 12:30 p.m. in the office trailer. Timing here is of no particular materiality, though relevant, except perhaps for purposes of making credibility findings.

[41] Whitson did not initially identify any particular person to whom he was talking in the January 7 trailer interview but later in his testimony, identified Rahn as one to whom he spoke on that date. Whitson testified that it was his policy to ask prospects about their willingness to travel because the Respondent's other crews usually needed help and he would pass the qualified applicant along to the appropriate crew chief.

[42] According to Tracy Johnson, Whitson said in a cocky manner, with regard to the January 7 applicants," They were f—g union carpenters, and I ain't hiring them." (Tr. 414.) Additionally, Greear, who saw the January 7 applicants on the jobsite, testified that Whitson, in a serious tone, told him that he was not going to hire them, that they were all f—g union carpenters. The General Counsel argues that these statements of Tracy Johnson not only contradict Whitson, but also show the Respondent's animus against the Union. These statements also form the basis of certain 8(a)(1) charges in the complaint and will be discussed later herein.

[43] Regarding the January 9 break trailer encounter, Whitson testified as "I think it was the 9th, I was in there and I talked—I don't remember who it was. I talked to somebody and they [sic] asked me the same question, if I was going to hire any of these applicants and I said, No, I don't need any damn carpenters." (Tr. 782.)

[44] For example, both Greear and Curtis Johnson were administered the questionnaire examination. See GC Exh. 12(a)—Geear's, and GC Exh. 14—Johnson's. Clearly the questionnaire is not always administered to all new applicants as some employees occasionally were interviewed over the telephone. Coberley, who interviewed some workers hired for the Leipsic job in this fashion, testified that some jobs awarded to the Company have little lead time necessitating a break from the normal hiring process.

[45] Whitson testified that Coberley then needed five people for an Iowa job; and Jack Shockley was running a job in South Carolina. Whitson himself was looking for workers for future jobs in Illinois and Pennsylvania. Notably, according to Whitson, the Respondent experienced a big turnover among its travelers who, by experience, do not stay with the Company for extended periods.

[46] Whitson testified having specifically considered Terry Bishop for employment and remembered asking him if he could perform millwright work when he and others filled out the applications. He also identified Scott Blair as an applicant he specifically considered for work with the Company.

resumes and a cover letter to the Respondent's Leipsic project.[47] As noted earlier, these resumes were sent in response to the Respondent's advertisements placed in a Tulsa newspaper around January 25.

The complaint alleges in part 8, in essence, that since on or about January 30, 1998, the Respondent discriminatorily and unlawfully failed to accept applications from and consider for employment, notwithstanding the availability of jobs, the following named persons because of their union membership and involvement:

Leslie Atkin	John C. McCarthy
Donald Bope	Edward Neumeyer
Robert Chasteen	Garry Parks
Denise Cowell	Mark Parsons
Jeff Dougherty	Keith Stanley
Calvin Hollar	Christina A. Tinsley
David Ladd	Joseph D. Waterfield

At the outset, it should be noted that these individuals did not personally submit formal applications. Rather, these were actually resumes prepared by the Union that were submitted along with a cover letter describing them as applicants. Also, none of the 14 individuals testified at the hearing.[48]

The union officials involved in the claimed submission of these resumes testified. Ray Lorton prepared the 14 January 30 resumes or, more precisely, was responsible for their preparation. According to Lorton, he spoke to each of the January 30 applicants and told each that the Union was preparing resumes pursuant to its organizing activities slated for certain unsigned contractors, including the Respondent.

According to Lorton, members willing to participate in salting campaigns were asked to fill out questionnaires at union meetings. He took the information and converted the handwritten questionnaires into a resume format; these resumes are kept on file and periodically updated. The Union has around 25 such resumes of willing members. The resumes of the January 30 group were prepared in this way and, according to Lorton, were updated by the respective members at union meetings occurring in either December 1997 or January 1998.

Lorton could not verify that each of the 14 had actually seen his or her resume prior to submission. Moreover, he did not personally consult with any of them immediately prior to submitting the resumes. However, he said that he had told each that their resumes would be going to the Respondent. It was Lorton's opinion that the applicants were available for work with the Respondent around the time of the submission because of the recent updating and because only willing and available members allow their names to be submitted as part of organizing campaigns or will work as salts.

Lorton authored the cover letter to the Respondent that accompanied the resumes and maintained that the information contained in it was true to the best of his knowledge and belief at the time.[49] Lorton conceded that the resumes were solicited and compiled with a view towards the Union's organizing efforts at certain local contractors and not based on the Respondent's Tulsa ad about which the Union had no prior knowledge.

After assembling the resumes and signing off on the cover letter, he gave the package to Rahn for delivery to the Respondent. Lorton never followed up on these applications and never contacted the 14 individuals to get them to check on the applications made on their behalf.

According to Lorton, the Union knew that the Respondent had "cleared the job off" and was headed for Pennsylvania by the end of January, but because of the Tulsa ad, the Union felt the Respondent was trying to circumvent it to avoid hiring more union workers. Consequently, the Union decided to submit the resumes as a countermeasure.[50]

Rahn testified that he attempted to hand-deliver the 14 resumes in the early afternoon of January 30 to Whitson at the jobsite; however, Whitson and the crew had left early as was the Company's practice on Fridays, a point that had slipped Rahn's mind. There was no mail slot in the door of the trailer which was otherwise locked. Accordingly, he faxed the resumes the following Monday (February 2) at around 3:43 p.m.

According to Rahn, the January 30 group was comprised solely of millwrights affiliated with Local 1393. This ploy reflected his attempt to cover all bases with respect to anticipated defenses of the Respondent to what he believed was its discriminatory practices regarding hiring union members. Rahn testified that he had a "premonition" that an argument would be made by the Respondent that carpenters were not qualified to do millwright work.[51]

According to Rahn, after the January 7 and 8 applications by his members, he did not instruct any to follow up or make ap-

[47] The resumes and cover letter are contained in GC Exh. 7. The exhibit also includes a so-called "send report" generated by the Union's fax machine. I note that the cover letter is dated January 30, 1997. Based on the credible testimony explaining that there was a typographical error regarding the year, which in fact is commonly made early in the new year by many people, I have considered the letter as being authored in 1998.

[48] The General Counsel did not offer any reason for their nonappearance or for the nonappearance of some of the members comprising the January 7 and 8 applicant groups.

[49] In the cover letter, Lorton, among other things, stated that the 14 applicants were willing to travel and that they were qualified millwrights. At the hearing, Lorton could basically only verify that the 14 were millwrights and was not able to say with certainty that they were willing to travel. In fact, however, regarding travel, Lorton told the members that they would be salts on local jobs (the Respondent's and the Protek job) because the Union, as it turns out, incorrectly thought the Respondent was going to be at Leipsic as much as a year. According to Lorton, he did not mention "travel" or the need to at the December and January union meetings where the questionnaires were handed out to the members willing to participate in the organizing efforts.

[50] Although the Union knew that the Respondent was near the very end of January packing up its tools, emptying trailers and such—clear signs of leaving a job—and was thought to be moving on to another job, to the Union this did not mean necessarily that the Respondent was leaving the Leipsic site. This is a rather incredible proposition.

[51] Evidently, Rahn's premonition was not grounded in the occult or providence since he testified that a Board investigator told him that the Respondent's position was that the work at the Leipsic site was not carpenters' work. However, Rahn emphatically denied that the investigator influenced his decision to send the January 30 resumes and could not remember whether this conversation took place prior to January 30.

pointments with the Respondent and, similarly, no attempt was undertaken by the Union or any of the January 30 group because everyone had been laid off at the Leipsic site. The job was over. Moreover, he thought that the Respondent simply would not accept the Union's letter[52] and the ad to which the Union was responding contained a fax number in Leipsic.

Before submitting the 14 resumes, Rahn admitted that he did not consult with them and could not say that the persons involved actually knew their resumes had been faxed to the Respondent.

Rahn conceded that Whitson told them on January 26 that the Respondent did not need workers and that the Respondent pulled out of the job a few days later. However, in spite of Whitson's denial, Rahn noted that the Union had received the Tulsa ad and, after all, Whitson had told them earlier in the month that the Company was going to need workers but was awaiting equipment.

Moreover, Rahn knew that Greear and Johnson had been laid off on January 30 but also knew that two employees, Lester Saxon and Don Hartnet, were still employed. Thus, he did not think with confidence that the job actually was being demobilized. However, Rahn admitted that he had no idea what the remaining workers were doing on February 2.

Rahn also conceded that the January 30 applicants did not submit true applications. He sent the resumes, nonetheless, because employers often put unions through "hoops" such as an instruction to "first send me resumes" when solicited for work. Since the Tulsa ad did not specify applications only, the Union elected to send the resumes.

As to the resumes of the January 30 group, Bishop testified that he faxed these to the Respondent on February 3. According to Bishop, Rahn told him that he had already faxed the materials, but Rahn could not say that the Respondent actually received it, as there was no printed send report. Accordingly, Bishop took the materials from Rahn and faxed them once more on February 3.[53] Bishop stated that the millwright members were selected because one of the salts employed at the Company said that Whitson had indicated with respect to the earlier applicants that they were "just damn carpenters," and he was not hiring them.[54] The Union then decided to send the millwright group because their qualifications would be automatically established. Bishop got the names from Ray Lorton who told him that the 14 persons would work for the Respondent,[55] but he did not know if they actually knew when the resumes were sent or to whom, with one exception (Joe Waterfield). Bishop also did not know whether the January 30 applicants were currently employed or otherwise were available for work at the time of submission. Lorton said that salts Greear and Johnson had told the Union that the Respondent was going to hire 15 more workers at the end of the month and *assumed* the positions were for the Leipsic job. Moreover, the Union had been advised by the two salts that Whitson was going to get rid of the entire existing crew and hire a new crew.[56] To be on the safe side, the Union wanted to put in additional applications. Based on Whitson's reported statements and buttressed by the newspaper ad, the Union thought that the Respondent was hiring and the applications were sent based on that assumption.[57]

The Respondent claims that it never actually received the January 30 and, accordingly, never considered these individuals for work.[58]

Whitson testified that around the first week of February (February 2–8) 1998, the Respondent was busy in what he describes as "demobilizing" or dismantling of the Leipsic job, which included laying off workers, packing and loading tools and equipment, returning leased trailers, and the like. Whitson said that during that last week, he was down to only three workers[59] who were principally engaged in packing and loading, and a clerical worker, Joan Hardin, who helped him load the Company's trailer and cleaned apartments rented by the Company for its traveling employees. According to Whitson, there was no construction work being performed by the Company. Whitson stated that only the office trailer had a telephone and fax machine. The company from which the Respondent rented the trailer was supposed to pick up the office (and the break trailer), so all of the Company's belongings had to be removed. Whitson testified that he finished loading the office equipment (including the telephone and fax) by 10 a.m. on February 2. Whitson claims that he did not check for any messages; in fact, he did not know how to check for messages from the fax machine, and did not know how to print the reports.[60]

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[52] Although Rahn had faxed correspondence to the Respondent's Florida headquarters facility to wit, the January 23 majority status letters, he did not fax the January 30 resumes or attempt to call the Respondent there.

[53] Bishop indicated that he circled the second transmission report and wrote "Faxed 14 applications" on GC Exh. 7. Bishop was not aware that the Union's fax machine kept an internal record of all materials faxed and that Rahn's fax had been entered into the union fax's memory.

[54] It is interesting to note that Bishop repeated a comment that Whitson emphatically insisted that he had made regarding those "damn carpenters, not those f—g union carpenters."

[55] Bishop testified initially that he was present at a November union meeting at which Lorton passed out questionnaires for the membership to fill out. He then revised his testimony and said that he was not actually at the meeting when Lorton passed out questionnaires but was shown a copy of the questionnaire by Lorton at a union meeting. Actually, he admitted that he did not know what Lorton had said to the members. (Tr. 295–296.)

[56] Whitson reportedly denied this, saying that the person who said this was drunk.

[57] Bishop also said that at the time of the faxing of the resumes, he also thought that the Respondent had jobs going in states other than Ohio, namely Pennsylvania and Illinois. Bishop noted that the 14 applicants provided resume information in November 1997. Therefore, he could not say whether these 16 persons were applying for jobs only in Leipsic or elsewhere. However, he ventured to say that the individuals themselves would have to be asked their intentions as to where they would work. This point should be obvious to all.

[58] Whitson specifically denied ever considering the 14 January 30 applicants because he never saw the resumes and had no knowledge of their existence.

[59] These workers were Kevin Conrad, Don Harnet, and Lester Saxon.

[60] According to Whitson, he was able to run off copies on the fax and could send fax messages. Clerical worker Joan Hardin performed

Whitson said that he received permission from a plumbing contractor at the Leipsic site to use its telephone and fax.[61] However, the plumbing contractor's fax was not operating so Whitson obtained permission to use the T & S fax machine.[62] Thus, according to Whitson, the Respondent's fax machine was out of commission and, in his view, he could not have received the January 30 resumes on the afternoon of February 2 and, certainly, not on February 3.

Applicable Legal Principles

An employer cannot lawfully (discriminatorily) refuse to consider for hire or refuse to hire applicants because of union affiliation or because the applicants may be organizers or intend to organize the employer. *Casey Electric*, 313 NLRB 774 (1996); *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995).

Preliminary to determining whether an employer has discriminated against an employee in violation of Section 8(a)(3) or (1) of the Act, the National Labor Relations Board has held that the General Counsel must first make a prima facie showing sufficient to support the inference that the protected organizing activity of the employees was a "motivating factor" in the employer's decision either not hire them or not even to consider them at all for employment. Once this is established, the burden then shifts to the employer to demonstrate that the nonhiring would have taken place, even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *B E & K Construction Co.*, 321 NLRB 561 (1996).

An alleged discrimination in refusing to consider applicants for hire, as with refusing to hire them, is discrimination in regard to hire within the ambit of Section 8(a)(3). In a discrimination case, a prima facie case is made when the evidence shows that:

1. The employer is covered by the Act.
2. The employer at the time of the purportedly illegal conduct was hiring or had concrete plans to hire employees.
3. That antiunion animus contributed to the decision not to consider, interview, or hire an applicant.
4. That the applicant was a bona fide applicant.

NLRB v. Ultra Systems Western Constructors, 18 F.3d 251 (4th Cir 1994), enfg. in part, denying in part, and remanding *Ultra Systems Western Constructors*, 310 NLRB 545 (1993), quoted in the *Ultra Systems Western Constructors* [11], 316 NLRB 1243 (1995); *3E Co.*, 322 NLRB 1058 (1997).[63]

C. The General Counsel's Position; Discussion

In essence, the General Counsel contends that the Respondent was clearly aware of the union membership of the January 7 and 8 applicants, as well as the Union's expressed intention to organize its work force during January 1998. The General Counsel further contends that the Respondent harbored animus against the Union and this hostility operated to deny these 17 unionists an unbiased consideration for employment with the Company when employment opportunities were available.

The General Counsel argues that in addition to the statements Whitson made to Tracy Johnson and Greear which indicate his hostility to the union applicants, the Respondent's animus is also demonstrated by Whitson's following a different hiring procedure with respect to the application of another union member, Greg Adkins, who testified at the hearing.

According to Adkins, then an unemployed member of Carpenters Local 1138 acting on information gained from Rahn at the union hall, he went to the Respondent's jobsite around 2-2:30 p.m. on January 7, 1998, accompanied by a friend.[64] Adkins, who was not wearing any union identifiers, went to the office trailer which was unoccupied. Whitson arrived shortly thereafter and introduced himself. Adkins said he asked about job availability, and Whitson replied that he was not hiring anyone (for the Leipsic job) at that time, but Adkins could fill out an application. According to Adkins, Whitson asked him what he could do, to which Adkins replied welding, carpentry, and cutting.[65] Whitson offered him employment but only in Iowa and Florida. However, Adkins replied that he could not travel because of ailing parents. According to Adkins, Whitson made reference to a group of applicants who evidently had

these other functions. Whitson could not recall the brand of the Company's fax machine but knew that it copied on regular bond paper as opposed to a paper roll.

[61] Whitson said the plumbing contractor was Regal Plumbing, which maintained an office trailer next to his. Steve "Doogie" Ambos, Regal's job superintendent, confirmed at the hearing his giving Whitson permission to use Regal's telephone and fax. While Ambos was sure that the Respondent left the site in late January or early February, he could not be precise about the date the Respondent was moving its equipment or when he told Whitson he could use the phone and fax. Ambos was not aware that anyone from the Respondent actually used his telephone or fax.

[62] Michael Hullinger, T & S's project manager at the Leipsic IAMS project, testified that he and Whitson talked on February 2 about "getting stuff returned and disconnected" (Tr. 694) and he told Whitson he could use T & S' phone, faxes, and copiers which were around 300 feet from the Respondent's trailer.

[63] The Respondent, however, argues that the Sixth Circuit in *NLRB v. Fluor Daniel, Inc.*, 102 F.3d 818, 832 (1996), articulated the following test for the establishment of a prima facie case in a refusal-to-hire case: (1) that the employer is covered by the Act; (2) that the applicant is covered by the Act; (3) that the applicant actually applied for a job and was qualified for a job for which the employer was seeking applicants; (4) that despite his or her qualifications, the applicant was not hired; (5) that antiunion animus contributed to the decision not to hire an applicant; and (6) that after rejection of the applicant, the position remained open and the employer continued to seek applicants from persons with the applicants qualifications. See also *Architectural Glass & Metal Co. v. NLRB*, 107 F.3d 426 (6th Cir 1997), in which the *Fluor Daniel* test was reiterated and determined as binding in the Sixth Circuit refusal-to hire-cases. The application of *Fluor Daniel* to the facts of this case will be discussed, infra.

[64] Rahn testified that he sent Adkins down to the Leipsic job because he felt that the Union had no chance of being hired. According to Rahn, he instructed Adkins to apply but not to wear any union insignia. Adkins agreed and asked to take a nonunion friend with him. The friend evidently did not apply.

[65] Adkins considered himself a carpenter but could weld, fabricate steel, and set equipment; he has done millwright work and has worked with millwrights setting equipment. According to Adkins, he was not administered a welding test.

earlier been onsite as union carpenters from Toledo. A few days after the January 7 encounter, Adkins, who had reported Whitson's offer to Rahn, called the Respondent asking for Whitson who was not available to check on his application. Adkins never received a promised return call from Whitson, and Adkins never rechecked on his application.

The General Counsel contends that Whitson treated Adkins differently from the known union applicants solely because Adkins' union membership was not visible, which, in his view, points clearly to the Respondent's animus against the Union.

As to the January 30 group of applicants, the General Counsel contends that the Respondent's animus toward the Union was continuing and operated to deny them consideration for work also. The General Counsel argues that the Respondent's denial of receipt of these resumes is not credible and should be rejected. All in all, the General Counsel submits that he has prima facie met his burden to establish the unlawful treatment of all of the union applications and that the Respondent's defenses were insufficient to overcome the charges of violations of Section 8(a)(3) and (1).

It should be noted that with regard to the 8(a)(3) allegations, the complaint, first, states in part 7 that the Respondent failed to accept the applications of the 14 initial applicants. In point of fact, the Respondent, beyond a shadow of a doubt, did indeed accept the applications of these persons. Accordingly, this aspect of the charges in part 7 of the complaint should be dismissed, and I would so recommend.

The complaint states in its remaining part that the Respondent also did not consider these applicants for employment because of the applicants' union membership, their engaging in concerted activities (organizing), and to discourage employees from engaging in these activities. Thus, the issue is whether the General Counsel has established even in a threshold fashion that the Respondent did not "consider" these applicants at all for employment, irrespective of their union activity or involvement.[66]

In my view, Whitson, in any reasonable sense of the word, did consider the applications of the January 7 and 8 group. Whitson, whose testimony in this regard I credit, engaged the members of both groups in conversation regarding the applications and queried them on job-related matters of importance. For example, he asked the applicants about their willingness to travel and none of the group was willing to travel. He also queried them regarding their qualifications and concluded that they were carpenters not millwrights and, thus, not qualified to do the millwright work the Company performed. These queries were made of both groups.[67] Whitson also credibly testified that the Respondent indeed needed workers, although not for the Leipsic job, and that he considered all of these applicants for employment. Whitson said he would have hired them all but determined that they were not qualified to perform millwright work. Accordingly, he did not administer the questionnaire to any of them. While the General Counsel takes issue with the Respondent's statements and Whitson's handling of the applications and asserts that these applicants were not hired because of their union involvement, the Respondent has not been charged in the complaint with failing to hire the unionists.[68] The Respondent here has been charged with failing to consider the union members' applications. Here, too, the record does not support the allegation. Whitson clearly considered the applications and determined, for reasons having nothing to do with the Union, that the group members were unwilling to travel (the Leipsic job was indeed winding down), and in his view the applicants were carpenters and not millwrights. Whitson's assessments and actions reflect the product of his thinking process, which, in a word, redounds to "consideration" of the applicants and their applications.

As to Whitson's treatment of Adkins' application, contrary to the General Counsel, I cannot see where, in any meaningful way, Adkins was treated any differently from the known unionists. Whitson, consistent with his testimony regarding his handling of the union applicants, queried Adkins regarding his qualifications, which clearly met his definition of a person able to do millwright work; he also queried Adkins about his willingness to travel. It is clear that based on his qualifications, Whitson would have hired Adkins; but Adkins was unwilling to travel. Hence, he was not hired because he could not meet the Respondent's second criterion. Whitson's handling of Adkins' application differed in my view in no material way from his handling of the January 7 and 8 applicants. I note that Rahn sent another union member, Lyndon Coutcher,[69] to apply for work with the Respondent a few days after January 8; Coutcher also did not wear union paraphernalia. Whitson testified that Coutcher came to the jobsite on about January 11 and asked for an application that was given to him. According to Whitson, Coutcher indicated on the application his millwright experience, which prompted Whitson him to administer him the questionnaire examination.[70] Whitson asked Coutcher whether he would travel and Coutcher replied that he was willing. Whitson told Coutcher that he was not hiring at Leipsic, but determined that Coutcher was qualified and faxed his application to crew leader Jack Shockley in South Carolina. According to Whitson,

[66] The Random House College Dictionary (First Edition) defines the verb consider as follows: to think carefully about, especially in order to make a decision; contemplate; or reflect on.

[67] I have also credited Whitson's testimony about the January 8 encounter with the applicants over that of Scott Blair. Blair notably testified he dealt with the Respondent's secretary, and not Whitson. This was frankly baffling to me. Also, Blair's testimony regarding the spontaneity of his assembling the applicants did not jibe with the planned motive of the venture as credibly described by Rahn, Bishop, and Lorton. Since the General Counsel produced no other witnesses for the January 8 group, Whitson's testimony essentially by default is the more believable.

[68] I note that Whitson's assessments of millwright work and carpenter's work may not be truly accurate or correct given the overlap of attributes and requisites of the two trades. However, his determinations were not unreasonable considering that the millwrights and carpenters, though associated in the District Council, nonetheless maintain a clear trade autonomy. Whitson also credibly testified that based on his definition, he has never hired a carpenter. Moreover, considering the itinerant nature of the Respondent's business, the travel criterion is not only reasonable, it seems quite integral to the Respondent's business.

[69] Coutcher did not testify at the hearing.

[70] R. Exh. 11 contains Coutcher's applicant questionnaire.

Coutcher never showed up for work. Contrary to the General Counsel, I believe that the paramount considerations for employment for the Respondent were qualification to do millwright work and, at the relevant time, a willingness on the applicant's part to travel as the Respondent's work at Leipsic was drawing to a close.[71] On this record, I cannot find that hostility to the Union or its organizing effort motivated the Respondent's rejection of the January 7 and 8 applicants. Rather, Whitson's decision not to administer the questionnaire to them reflected his consideration of their lack of qualification in his mind and their stated unwillingness to travel, which, in my view, are legitimate reasons for his rejection of them as employees.

Accordingly, in my view, the General Counsel did not establish that the Respondent failed to accept the applications, nor did he establish that the Respondent failed to consider these applications by the preponderance standard. Since the General Counsel failed to meet these threshold elements, I would recommend dismissal of this aspect of the complaint as to the January 7 and 8 applications.[72]

Directing myself to the Respondent's position regarding the January 30 group of millwright applicants, the Company's principal defense comes through Whitson who emphatically insisted that he did not consider the resumes because he personally never received them. At the hearing, Whitson professed a total ignorance of these applicants and their resumes. The General Counsel disputes Whitson and asserts that he is being untruthful. The issue of whether Whitson received the resumes is integral to resolving this part of the controversy. Again, it is useful to note that the complaint in part 8 again charges the Respondent with failing to accept the applications of the January 30 group and consider them for employment because of their union membership and involvement. Thus, again, as a threshold matter, the General Counsel has the burden of proof to show that Whitson, the only employee of Respondent to whom the resumes were addressed and purportedly sent, actually could be said to have received them and, then, that he failed to accept and consider these applicants for employment because of hostility to the Union.

Pursuant to its claim that the Respondent (Whitson) indeed did receive the faxed resumes, the General Counsel adduced the "send" sheet generated by the Union's fax machine which indicates by two entries thereon that the resumes and cover letter were faxed to the Respondent's fax number at the Leipsic site at specific times on February 2 and 3 and that the Union's fax machine registered receipt of the faxed materials by an "OK" symbol to buttress its case. The General Counsel also called several witnesses of the Respondent to testify about the last days of the Respondent's presence at the Leipsic site.

Don Hartnet[73] testified that the Respondent began the demobilizing process at Leipsic on Monday, February 2, and he had been dismissed by noon on February 4. According to Hartnet, as of the time of his dismissal, everything had been picked up in the break trailer, but there was "stuff" in the office trailer. He could not recall, however, what he exactly saw in the office trailer. Hartnet thought that he made telephone calls from the office trailer and there was still some equipment in the office trailer on February 4. The tool maintenance worker, Lester Saxon, testified and confirmed that around February 2, Whitson started dismantling the job and he helped with the loading chores. According to Saxon, he personally took the Respondent's fax machine out of the office trailer on the evening of February 3 and put it in the back of the Company's trailer. Saxon testified that at the time he removed the fax, it was hooked up; he unhooked it to remove it, and there was a roll of carbon-type paper in the machine.

The Respondent called as a purported expert on telefax machines, Ron Schmidt. The General Counsel opposed the Respondent's motion to declare Schmidt a fax machine expert, but withdrew his objection in his brief. I took Schmidt's testimony and held in abeyance my ruling on his expertise and opinion with respect to fax machines and their operations, features, and characteristics. Rule 801 of the Federal Rules of Evidence provides as follows:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
>
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
>
> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Guided by this rule, and considering Schmidt's training and other credentials and his testimony which demonstrated a breadth of knowledge of and experience with a broad range of commercial fax machines, and being impressed with his candor and the impartiality of his testimony, I would conclude that Schmidt possessed the requisite expertise regarding fax machines and give his opinion testimony the weight accorded to experts.

[71] It is here again worth noting that in spite of the Union's steadfast view that the Respondent was going to be working at the Leipsic site for a long period, as much as a year, that clearly this was not true. Notably, both Adkins and Coutcher were offered jobs out of state and certainly communicated that information to Rahn and the Union.

[72] Since I believe that the General Counsel did not meet its burden in proving these threshold elements, the issue of animus becomes moot. However, with respect to these applicants, the General Counsel's arguments advanced in his brief to support animus are not persuasive. Under the facts and circumstances of this case, it appears to me that the union members were given a fair opportunity to apply for jobs and were considered for jobs based on the Respondent's stated criteria—willingness to travel and qualification to do millwright work. In short, in my view, the evidence of animus on this record was weak to nonexistent with respect to these January 7 and 8 applicants.

[73] Hartnet began working for the Respondent on December 29, 1997; he became a member of Millwrights Local 1393 after leaving the Respondent's employ.

In essence, Schmidt testified that a confirmation or send report generally indicates the date and length of time the transmission took and will indicate an "OK" where the faxed materials have been transmitted through the telephone lines and have been received at the other end. Schmidt testified it is possible, however, for a machine to register an OK for the receipt of the transmitted material but the documents may not have actually been received at the other end. Schmidt pointed out several scenarios which could produce such a result: (1) documents being placed in the fax upside down so that the receiving machine receives blank paper; (2) the receiving machine was unplugged temporarily and then reconnected; (3) the receiving machine was out of paper;[74] and (4) the transmission line was faulty. Schmidt was doubtful about intentional tampering, e.g., tampering with the machine's clock feature. Schmidt saw no obvious tampering with the machine or its mechanisms here.

Schmidt examined the send report associated with the January 30 group transmission and opined that from a mechanical point of view the 29 pages of documents were sent and received by respective fax machines of the Union and the Respondent. However, according to Schmidt, unless the parties involved verified the receipt, one could not be absolutely sure that the documents were actually received on the receiving end. According to Schmidt, the "OK" simply indicates an electronic "hookup" between the send machine and the receiving machine through means of the telephone lines. In his view, "received" could mean the transmitted material is still in a machine memory or has been printed and sitting in a receiving tray but no one ever physically picked it up. Schmidt finally opined that his examination of the documents in question would lead him to conclude that the "OK" on the send report in question more likely than not meant that the 29 pages of documents were received by the receiving fax machine.[75] I will conclude, based on the totality of the credible evidence, that the Respondent's fax machine did receive the 14 resumes and cover letter associated with the January 30 group on February 2 and 3. In my view, Whitson was mistaken in his testimony that he had packed up the company fax machine around 10 a.m. on February 2, and in that regard, I have credited Saxon's testimony that he personally removed the machine on the evening of February 3, a plausible time frame considering that the machine was receiving transmittals as of the afternoon of February 3.

However, be that as it may, receipt of the materials via machine does not establish that Whitson actually received the resumes for purposes of the relevant charge.

Whitson basically admits and contends that he did not accept or consider the applications of the January 30 group, but not because of union involvement, but because *he* simply never physically received them. Thus, it is the General Counsel's burden to prove that consistent with the charge, Whitson did receive the resumes and engaged in unlawful conduct with respect to his handling of them. Notably, here, the Union chose the methodology—fax—to deliver the resumes to the Respondent and quite against commonsense or good practice, in my view, never followed up on its submission at the time, or ever. Moreover, the Union chose to send the resumes to the Company fully aware that the Company was pulling up stakes at the Leipsic job, had laid off employees, and was demobilizing. If there ever was a time for the Union to verify communications with the Respondent, the first week of February 1998 was the time. But nothing was done to verify the receipt of these resumes by the Respondent. In my view, the General Counsel produced no directly corroborative evidence to rebut Whitson's denials. Whitson was a generally credible witness, and nothing in his demeanor or testimony suggested that he was not being truthful regarding his nonhandling of the resumes. Thus, on balance, the General Counsel again has not met a threshold burden of showing that Whitson ever physically received the January 30 resumes. Failing in that threshold aspect, the charge of discriminatory conduct—discriminatorily failing to accept and consider the resumes—fails as well. I would recommend dismissal of this aspect of the complaint.[76]

D. The 8(a)(1) Charges

In part 6 of the complaint, the Respondent is charged with three specific instances of violations of Section 8(a)(1) of the Act.

1. The November 17, 1997 statement about wages

The complaint alleges in part 6(a) that on or about November 17, 1997, Whitson unlawfully cautioned an employee not to discuss his wages or per diem with other employees; the employee in question was Duane Greear. Whitson, in answer to a question posed by me with respect to this allegation, admitted that the allegation was true.[77] Whitson explained how the statements came to be made. Essentially, Whitson wanted to hire Greear but the Respondent's wage rate—$12.50 per hour—was not acceptable to Greear who wanted $14 per hour.

[74] Schmidt noted that most sending machines will not usually record an "OK" in such cases unless the machine possessed a memory feature. Where there is a memory feature, the machine will generate a report that the documents were sent. Schmidt was not familiar with the manual for the Union's machine but has worked on this model. (See GC Exh. 15.)

[75] Schmidt, technically trained and knowledgeable about fax machines, said that in spite of an assumption of receipt based on the "OK," he would, nevertheless, follow up the transmittal with a telephone call to the receiving party to confirm the receipt of the items faxed.

[76] I note in passing that among the several defenses offered by the Respondent, the lack of bona fides of the applicants comprising the January 30 group resonates with me. In my view, the January 30 resumes were merely collected by the Union with little or no input from the named applicants regarding their sincere interest in working for the Respondent. None of these persons testified at the hearing, and no reason was given for their nonappearance. I have rejected the charge regarding the January 30 group for the reasons stated above, not because of a lack of bona fides as argued by the Respondent. However, in addition to the weak showing of animus against the Union here, I would have been persuaded to a finding of lack of bona fides in these applicants. Accordingly, had I reached the issue, I believe that the General Counsel failed in making out a prima facie case under either the *Wright Line* analysis or the *Fluor Daniel* standard, and a recommended dismissal would have ensued.

[77] At the conclusion of the General Counsel's direct examination of Whitson, I asked Whitson to read over the complaint's parts 6(a), (b), and (c). I then proceeded to ask him in series whether the allegations contained in these respective parts were true, and he answered in the affirmative as to the truthfulness of the allegations. (See Tr. 600–601.)

Greear, as a local job prospect, was not entitled to the $1.50 hourly per diem the Respondent normally paid to travelers. However, Whitson told Greear he would pay him the per diem but, inasmuch as he had other local workers on board, he asked him not to discuss this arrangement with them. Whitson insisted that he did not caution Greear not to discuss his wages but only his per diem. Greear testified that Whitson told him at his interview that the Company could not pay him the $15 per hour he requested on his application but that he would pay him $12.50 plus a $1.50 per diem. Greear said he accepted the offer but Whitson asked him not to discuss his *wages* with anybody else. Greear said that he made no response to Whitson's request.[78]

2. The January 7, 1998 statement not to hire "any union guys"; the January 7, 1998 statement not to hire "guys from the Carpenters Union"

In part 6(b) of the complaint, it is alleged that Whitson and Buril Hardin,[79] while in the Respondent's job trailer at the Leipsic site, threatened not to hire any union guys. This charge stems from statements Whitson allegedly made to Tracy Johnson in the jobsite break trailer. Tracy Johnson testified that after the January 7 group of applicants left the site, he *jokingly* asked Whitson whether he was going to fire all of the existing crew and hire a new crew (presumably drawn from the applicants). According to Tracy Johnson, Whitson responded to him in a very cocky tone, "[t]hey were f—g union carpenters and I ain't hiring them." According to Tracy Johnson, Whitson made this statement in the presence of Greear, who was sitting across from him (Johnson), but there were other employees at the other table.

The complaint in 6(c) charges that again in the break trailer on January 7, Whitson threatened not to hire "guys from the Carpenters union." Greear testified about this incident. According to Greear, referring to the January 7 group whom he earlier had seen in the office trailer, *he asked,* in the presence of Tracy Johnson who was seated across from him, when the second shift was going to start. According to Greear, Whitson, in a serious tone and in the presence of other employees, said to him that he was not going to hire them, that they were all f—g union carpenters.[80] None of the employees made any response to the comment.

Saxon also testified and stated that he saw a group of people apply for work on January 7. Later, in the break trailer, he overheard Whitson respond to a question (from an unidentified employee) as to whether the applicants were a new crew to be hired by the Respondent. According to Saxon, Whitson, "in an arrogant tone" said that all of the applicants were carpenters, and he was not going to hire any of them.

Whitson admitted to conversing with Green and Tracy Johnson by chance on January 7 in the aftermath of the applicants' departure. According to Whitson, the conversation with Greear and Johnson did not occur in the break trailer but while he was walking between the mill building and the silos. Whitson said he happened on Greear and Johnson, and Greear asked him if he was going to hire any of the applicants. According to Whitson, he told them "No!" and also told them he did not hire them because he did not need any carpenters. Whitson admitted that on January 9 in the break trailer, he said "No, I don't need any damn carpenters," and there were about six people in the trailer at the time. Whitson emphatically denied saying he was not going to hire "any union guys."[81]

Applicable Legal Principles

Employer interference, restraint, or coercion of employees who exercise their statutory right to form, join, or assist labor organizations are unlawful under Section 8(a)(1) of the Act. The test under Section 8(a)(1) does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which it may be reasonably said tends to interfere with the free exercise of employee rights under the Act. *Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.*, 305 NLRB 626 (1991); and *American Freightways Co.*, 124 NLRB 146, 147 (1959); Thus, it is violative of the Act for the employer or its supervisor to engage in conduct, including speech, which is specifically intended to impede or discourage union involvement. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993); *Williamhouse of California, Inc.*, 317 NLRB 699 (1995). The test of whether a statement or conduct would reasonably tend to coerce is an objective one, requiring an assessment of all the circumstances in which the statement is made as the conduct occurs. *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109 (1995).

Turning to the alleged violations, the General Counsel contends that Whitson's admonition to Greear regarding his wages clearly was intended to interfere with the free exercise of rights guaranteed under the Act and could reasonably be said to discourage employees in discussing a matter of mutual concern to them. As noted by the General Counsel, the Board clearly has condemned an employer prohibition against employees' discussing wages among themselves. *Waco, Inc.*, 273 NLRB 746 (1984). Absent a showing of substantial and legitimate business interests supporting such a policy, employees may not be

[78] Greear did not specifically indicate whether he complied with Whitson's request not to discuss his arrangement with Whitson.

[79] The General Counsel contends that Hardin was a supervisor or agent of the Respondent within the meaning of Sec. 2((11) and/or Sec. 2(13) of the Act. The Respondent disputes this but concedes that Hardin was a working foreman. Hardin did not testify at the hearing. Except for being mentioned in the charges, Hardin was not testimonially implicated in the 8(a)(1) charges so his supervisory or agency status is irrelevant, and, therefore, I need not rule on his status under the Act.

[80] The Respondent provided its employees three daily break periods—in the morning (around 10 a.m.), lunch (around noon), and afternoon (around 3:30 p.m.). According to Greear, Whitson's statement was made on the last or afternoon break.

[81] Whitson, reflecting on my question and his admission regarding the part 6(b) statement said that Buril Hardin was not in the job trailer on January 7 and, in fact, according to the Respondent's pay records, Hardin was not working that day. (See R. Exh. 9.) Therefore, according to Whitson, when on my examination, he admitted to the truthfulness of the allegation in part 6(b), he was mistaken because neither he nor Hardin was in the break trailer when he encountered Johnson and Greear.

precluded from discussing their own wages with each other. *International Business Machines Corp.*, 265 NLRB 638 (1992).

The Respondent asserts that Whitson did not direct Greear not to discuss his wages, but only his per diem, because of the Respondent's policy not to pay local workers a daily subsistence allowance. Thus, the Respondent's defense to the November 7 statement is bottomed on a mixture of a narrow definition, "wages" and justifiable company policy. In my view, Greear and Whitson were negotiating his wages pure and simple, and Whitson merely employed the Respondent's allowance of a per diem to travelers as a device to get Greear an additional $1.50 per hour, which Whitson hoped would bring the Respondent's offer more in line with Greear's wage demand. To say that in the context of their negotiation that per diem was separable from Greear's "wages"—the Respondent's position—is tantamount to sophistry and must be rejected.

Moreover, the Respondent clearly violated its own stated policy in granting Greear a wage concession through the per diem policy, which clearly did not apply to a local worker such as Greear. Thus, in no way can it be gainsaid that there was a substantial and legitimate business reason/interest undergirding Whitson's warning to Greear not to discuss their arrangement with the other workers. The clear upshot of Whitson's statement in my mind was unreasonable interference with Greear's and, derivatively, the other employees' free exercise of their Section 7 rights. I would conclude that the Respondent violated Section 8(a)(1) of the Act with regard to Whitson's November 7 statement to Greear.[82]

Regarding the January 7 statements allegedly made by Whitson to Tracy Johnson and Greear, the General Counsel contends that these statements not only are violative of Section 8(a)(1) but supply evidence of animus by the Respondent to the Union. The Respondent contends that Whitson did not make the statements attributed to him to by Johnson and Greear and that in any event, at least as to Johnson, their conversation was jocular in nature and therefore innocuous. I would first note that the alleged January 7 statements supporting the charges in parts 6(b) and (c) seem to have been made at the same time and place, inasmuch Greear and Johnson, if their testimony is to be believed, were each a witness to strikingly similar statements Whitson allegedly made to them and others in response to a question posed by each man to Whitson. As such, the charges in parts 6(b) and (c) appear to be duplicitous, if not confusing. Thus, in short, if Johnson's testimony is to be credited, he asked Whitson in the presence of Greear about the Respondent's plans to hire the applicants and Whitson responded to him as alleged. On the other hand, if Greear is to be believed, he, too, in the presence of Johnson, asked Whitson a similar question about the Respondent's plans to hire the group and received Whitson's reply as alleged. This is an unseemly, if not bizarre, set of circumstances. The whole issue is compounded by Whitson's complete denial of making the statements attributed to him and suggesting yet another scenario for his response to questions from Johnson and Greear about the Respondent's plans for the applicants. Then Saxon, without mentioning Greear and Johnson, claims to have overheard Whitson say he was not going to hire carpenters in the break trailers at a time that would seem to correspond to Johnson's and Greear's testimony.

As with all charges, the General Counsel has the burden of proof with respect to these allegations which, in my view, turn wholly on the credibility of the witnesses. Clearly, by his own admission, Whitson on two occasions did tell employees that he was not going to hire the January 7 applicants and perhaps the January 8 ones as well. And he spoke in terms of not hiring them because they were "carpenters," reflecting his stated view of their lack of qualification or desirability for purposes of the Respondent's needs. Whether he said "union" carpenters is the real issue, profanities notwithstanding. If I were convinced that he said "union carpenters," "union guys," or some other pointed reference to the applicants being union members, then I would find that the General Counsel has met its burden. In such a case, the statements would indeed be coercive because it seems clear that many of the Respondent's employees were aware that a group of union applicants had descended on the jobsite, and in the end none were hired. In this instance, one could reasonably say that Whitson's statements were unreasonably coercive, and hence unlawful. However, on this record, I did not see the General Counsel's witnesses as any more credible in their claims than Whitson in his denials. Greear was a salt and cannot be considered impartial; Johnson joined the Union evidently after being converted to the Union's cause and is not impartial in that sense. As for Saxon, he merely overheard Whitson say he was not going to hire carpenters, a point Whitson owned up to throughout the hearing. In my view, the evidence regarding the January 7 allegations is in equipoise. Accordingly, the General Counsel has failed in its burden of proof, and I would recommend dismissal of the charges in parts 6(b) and (c) of the complaint.

CONCLUSIONS OF LAW

1. The Respondent, B & C Contracting Co., is an employer engaged in commerce within the meaning of the Act.

2. Northwest Ohio District Council of Carpenters a/w the United Brotherhood of Carpenters and Joiners of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By its supervisor's telling an employee, Duane Greear, not to discuss his wages and/or per diem allowance with the Respondent's employees, the Respondent violated Section 8(a)(1) of the Act.

4. The Respondent has not violated the Act in any other way, manner, or respect.

THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice warranting a remedial order, I shall recommend that it cease and desist from engaging in such conduct and that it take certain affirmative action designed to effectuate the policies of the Act.

[82] The Respondent suggests that Greear was not a credible witness. I found that with respect to this incident, Greear was credible. By contrast, I did not find Whitson wholly forthcoming, and his change of testimony did not help his cause.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[83]

ORDER

The Respondent, B & C Contracting Co., Kissimmee, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from telling prospective or current employees not to discuss their wages and per diem with other employees.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Kissimmee, Florida, and at jobsites in remote locations where the Respondent is currently conducting business operations, copies of the attached notice marked "Appendix."[84] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 7, 1998.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell our prospective or current employees not to discuss their wages or per diem with other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

B & C CONTRACTING CO.

[83] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[84] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."